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IN THE

Supreme Court of the United States

October Term, 1950

No. 120

HEREFORD B. PORTER,

Petitioner,

vs.

WARREN R. BENNISON, MARGARETTE BENNISON, and G. W. HENDRICKS, Administrator of the Estate of George W. Mattingly, Deceased, and Individually,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND SUPPORTING BRIEF

I. H. SPEARS,
Attorney for Petitioner,
73 W. Bellevue Drive,
Pasadena 2, California.

THOMAS CAMPBELL,
Associate Counsel.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, AND SUPPORTING BRIEF

To the Honorable Supreme Court of the United States:

The petitioner, Hereford B. Porter respectfully prays for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit to review the decision or judgment of said court rendered on the 6th day of March, 1950.

Summary Statement

The opinion and judgment sought to be reviewed is Hereford B. Porter vs. Warren Bennison, Margarette Ben-

nison, and G. W. Hendricks, Administrator of the estate of George W. Mattingly, deceased, and individually, No. 3999, in the record herein (Tr. Court of Appeals, pages 15-24 not yet reported), dated March 6th, 1950—Jurisdiction.

The Court has jurisdiction to review said decision and judgment under Section 240(a) of the Judicial Code, (28 USC Sec. 347), USCA Title 28, Section 1254; U. S. Const. Art. III, Section 2.

The Constitutional and Statutory Provisions Believed to Sustain the Jurisdiction Are:

Art. IV, Section 2; Art. V, Amendment to U. S. Const.; U. S. Const. Art. I, Section 10; Art. III, Section 2; XIV Amendment, Section 1; and, Tit. 8 USCA, Sections 42, 43, and 47; Tit. 28 USCA, Sections 41(1), a, b, 41 (12), 41 (14) United States Code, 1948, Title 28 Sections 1254, 1331, 1332 a, (1), 1343 (1), (2), (3) and 1391 a, and (b).

U. S. Const. Art. III, Section 2, Provides: "The judicial power shall extend to all cases, in law and equity, arising under the Constitution, the laws of the United States * * * to controversies between citizens of different states." "In all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction."

Title 28 USCA, Section 1254, Provides: "Cases in the Court of Appeals may be reviewed by the Supreme Court by the following method: (1) BY WRIT OF CERTIORARI GRANTED UPON THE PETITION OF ANY PARTY TO ANY CIVIL OR CRIMINAL CASE, before or after rendition of judgment or decree.

(APPENDIX TO RULES)—Amended and reenacted—Judicial Code Section 240(a), Provides: "In any case, civil or criminal, in a circuit court of appeals * * * it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether government, or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

THE STATUTE OF THE UNITED STATES, THE VALIDITY OF WHICH IS INVOLVED is United States Code Title 28, Sections, 1331, Provides: "The district court shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3000.00, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

1332, Provides: "The district court shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3000.00, exclusive of interest and costs, and is between citizens of different states."

1343, Provides: "The district court shall have original jurisdiction of any civil action authorized to be commenced by any person, to recover damages for injury to his property, or because of the deprivation of any right, privilege of a citizen of the United States by any act done in furtherance of any conspiracy mentioned in Section 47 title 8, to redress the deprivation under color of statute, state law, or ordinance, regulation, custom, or usage, of any right privilege or immunity secured by the Constitution of the United States, or any Act of Congress providing for the equal

rights of citizens, of all persons within the jurisdiction of the United States."

UNITED STATES CODE, TITLE 8, SECTION 47(2), PROVIDES: "* * * IF TWO OR MORE PERSONS CONSPIRE FOR THE PURPOSE OF IMPEDING, HINDERING, OBSTRUCTING, OR DEFEATING, IN ANY MANNER THE DUE PROCESS OF JUSTICE, IN ANY STATE, OR TERRITORY, WITH INTENT TO DENY TO ANY CITIZEN THE EQUAL PROTECTION OF THE LAW, OR TO INJURE HIM OR HIS PROPERTY FOR LAWFULLY ENFORCING, OR ATTEMPTING TO ENFORCE THE RIGHT OF ANY PERSON OR CLASS OF PERSONS TO THE EQUAL PROTECTION OF THE LAW."

USCA TIT. 28, Section 1391, Provides: "A civil action where jurisdiction is founded only on diversity of citizenship, may except as otherwise provided by law, be brought only in the judicial district wherein plaintiff or all the defendants reside; a civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all the defendants reside."

The date of the judgment or decree sought to be reviewed is the 6th day of March, 1950, and the date of this application for writ of certiorari is the 10. day of June, 1950.

Nature of the Case

This is a suit in equity by the petitioner, a citizen of the state of Michigan, against respondents, citizens of the state of Colorado to recover from respondents property of the value of $250,000.00 taken from plaintiff by the false representations, fraud, forgery, and conspiracy, and wrong doing of defendants, respondents; to have the respondents declared trustees *exmalificio* for the benefit of petitioner; and to quiet title to lands described in complaint in petitioner;

for an accounting; for injunction; and for an equitable order directing a conveyance, of the lands described in complaint in petitioner (Transcript of record pages 2 to 8); respondents filed motions to dismiss for lack of jurisdiction, and failure to state a claim upon which any relief can be had as against the defendant. This suit was filed in the District Court for the District of Colorado.

After hearing in the District Court, on August 5, 1949 the district court entered opinion and judgment dismissing this suit for lack of jurisdiction, (Tr. pages 8 to 13). Notice of appeal was filed August 25, 1949 (Tr. pages 13 and 14); and this cause came on for hearing in the Court of Appeals for the Tenth Circuit and after argument the cause was submitted; and thereafter on the 6th day of March, 1950, the Court of Appeals for the Tenth Circuit entered its opinion and judgment affirming the decision of the District Court. (Tr.—Court of Appeals 21.)

The ruling of the Court of Appeals is in conflict with and against the provisions of the Acts of Congress and the provisions of Article III, Section 2 of the Constitution.

The ruling or judgment of the court of appeals is in conflict with the decisions of this court in the following cases:

National Mutual Ins. Co. vs. Tidewater Transfer Co., 337 U. S. 582, 93 L. Ed. 1558, 69 S. Ct. 1173; Payne vs. Hook, 74 U. S. (7 Wall.) 425, 430; Gaines vs. Fuentes, 92 U. S. 10; Barrow vs. Hunton, 99 U. S. 80; Gaines vs. Chew, *et al.*, 43 U. S. 619, 11 L. Ed. 406; Broderick's Will, 21 Wall. 503 Syl-4; Arrowsmith vs. Gleason, 129 U. S. 87; Lackerty vs. Phillips, 319 U. S. 182, 187, 87 L. Ed. 1339, 63 S. Ct. 1019; Simon vs. Southern Ry. Co., 236 U. S. 490, 493; Clark vs. Allen, *et al.*, 331 U. S. 503.

The judgment of the court is in conflict with the judgments of the Courts of Appeals in the following cases:

Harrison vs. Moncravie, 264 Fed. 779; Miama Co. Bank vs. Bancroft, (4 case) 121 Fed. 2nd 921; Blacker vs. Thatcher, 145 Fed. 2nd 255; Diamond vs. Connally, 276 Fed. 87; Rhine vs. Emory, *et al.*, 72 Fed. 382.

Questions Presented

Has the federal court under the Judiciary Act and the Constitution equitable jurisdiction to grant the relief in this cause?

Did the Court of Appeals commit error in sustaining or affirming the judgment of the District Court for lack of jurisdiction?

Reasons Relied on for the Allowance of the Writ

The judgment of the Court of Appeals is erroneous; petitioner seeks to have this court reverse the judgment; and the judgment of the Court of Appeals is in conflict with the Constitution and Acts of Congress, and deprives petitioner of his rights, privileges, and immunities, and property in violation of the guarantees of the Constitutions to citizens of the United States and all persons within its jurisdiction.

Wherefore, your petitioner prays that a writ of certiorari may be issued by this court.

I. H. SPEARS,
Attorney for Petitioner,
73 W. Bellevue Dr.,
Pasadena 2, California.

THOS. CAMPBELL,
Associate Counsel,
2247 Marion Street,
Denver 2, Colorado.

SUPPORTING BRIEF

Opinions Below

The opinion in the Court of Appeals is reported in ....F. (2d) ..... (Transcript Court of Appeals R 15-21).

Jurisdiction

Petitioner invokes the jurisdiction of this court under United States Constitution Article III, Section 2, and under (APPENDIX TO RULES—AMENDED AND REENACTED) Judicial Code Section 240 (a) (28 USC Section 347), and United States Code Title 28, Section 1254. The judgment of the Court of Appeals was entered on March 6, 1950. (Transcript Court of Appeals R. 21...).

Statement of Case

This is an equitable action brought in the District Court of the United States for the District of Colorado by the petitioner, a citizen of the state of Michigan, against the respondents, citizens of the State of Colorado as trustees of the estate of George W. Mattingly, deceased, on February 23, 1949, alleging that the petitioner has a vested equitable right of property, as sole heir and beneficiary of George W. Mattingly, deceased, to certain lands in Sedgwick County, Colorado; that Mattingly died on April 24, 1924, in Butler County, Nebraska; that on March 24, 1924, while Mattingly was lying sick in bed and unconscious, Charles W. Bennison and I. T. McCaskey placed before Mattingly a writing purporting to be a will, and took his hands and made his mark for him at the end of said will at the place where his signature was supposed to be, in the presence of Bennison, McCaskey, Charles C. Crosthwaite, R. C. Rick

and E. N. Stone, all white persons, and Joshua Coleman and Blanche Coleman, both Negroes, the decedent also being a Negro. That on February 11, 1926, the will was probated by the false and fraudulent testimony of some of the white persons named above; that decedent's sole heir at law was not served with notice of the probate; that all the testimony produced before the Nebraska probate court was untrue, and given for the purpose of deceiving and defrauding the court, and to obtain the probate of a false, fraudulent and forged will; that Bennison and McCaskey were bequeathed all of the property of decedent in said false and forged will; that this was done with the intent to deprive the heir at law and beneficiary of said estate, or his share in it, and that he was thereby in fact disinherited; that Crosthwaite had full knowledge of this fraudulent will and was one of the witnesses thereto; was appointed administrator, special administrator, and administrator with the will annexed; and for the purpose of carrying out this fraudulent scheme, secured the appointment of the defendant G. W. Hendricks as administrator of the decedent's estate in Colorado, County of Sedgwick, by filing in the Probate Court there a copy of said false will, and the probate thereof that had been made in Butler County, Nebraska, without notice to the plaintiff; that acting under this false will and probate, Hendricks collected $27,983.96, and that Crosthwaite and Hendricks fraudulently took possession of the real estate and personal property of the decedent situate in Colorado, each of whom had knowledge of this alleged fraud, and acted under said false and forged record.

The defendants appropriated unto themselves and their vendees the decedent's property with full knowledge of the fraud; that the real estate is valued at $100,000.00; that by virtue of said fraud this land was transferred to the defendants, all of whom had knowledge of the fraud; that the

income has been in excess of $100,000.00; that the defendants are constructive trustees *ex malificio*, for the benefit of petitioner; that petitioner is entitled to judgment quieting title to said lands in plaintiff, an accounting, the appointment of a receiver; that the fraud was discovered within three years of the filing of complaint; that petitioner has been deprived of his property without due process of law.

Petitioner prays judgment declaring defendant constructive trustees *ex malificio*, judgment directing conveyance of the lands, quieting title, accounting, injunction; or in the alternative, damages in the sum of $250,000.00. (Transcript R. Pages 2 to 8.)

On March 11 and 21, 1949, defendants filed motions to dismiss. (Tr. R. Pages 8 and 9.)

On August 6, 1949, the District Court dismissed this suit for lack of jurisdiction. (Tr. R. Pages 9 to 14.) On Aug. 25, 1949, NOTICE OF APPEAL was filed; October 3, 1949, transcript of record was filed in the United States Court of Appeals. (See transcript, *supra.*)

On March 6, 1950, the United States Court of Appeals entered final judgment affirming the judgment of the District Court. (Court of Appeals Transcript page 9-1...)

Specification of Error

The Court of Appeals committed error in dismissing this cause for lack of jurisdiction, when the Constitution and Acts of Congress say, there is jurisdiction.

(a) The judgment of the Court of Appeals is in conflict with Article III, Section 2 Constitution of the United States.

(b) The judgment of the Court of Appeals is in conflict with the United States Code Title 28, Sections 1331,

1332, 1343, 1391; and United States Code Title 8, Section 47(2).

(c) The judgment of the Court of Appeals is in conflict with the decisions of this Court on the question of jurisdiction under the Constitution and Acts of Congress.

(d) The judgment of the Court of Appeals in this cause is in conflict with the judgments of other Courts of Appeal on question of jurisdiction under the Constitution and Acts of Congress.

(e) The federal court has jurisdiction in this case.

Questions Presented

Did the Court of Appeals and the District Court have jurisdiction in this case?

Has the United States Supreme Court appellate jurisdiction in this cause?

Summary

By the points of facts as set out in the statement of case herein and the motion of respondents to dismiss, the respondents admit the claim of petitioner as alleged in the complaint (Tr. pages 2 to 8)—respondents admit there is a diversity of citizenship, admit the amount or value in controversy exceeds $3,000.00, exclusive of interest and costs, admit the fraud and forgery alleged, admit all the wrong alleged against the respondents, hence there is jurisdiction in the federal court.

Gaines *et ux.* vs. Chew *et al.*, 2 How (U. S.) 638-653, 11 L. Ed. 402, at page 650, the Supreme Court of the United States, says: "One man possesses himself wrongfully and

fraudulently of the property of another; in equity, he holds such property in trust for the rightful owner." And cites:

Patterson vs. Dickerson, 193 Fed. 328;
Seeds vs. Seeds, 116 Ohio St. 144, 156 NE. 193:
Rhino vs. Emory, 727 Fed. 382-387 Syl-3;
Arrowsmith vs. Gleason, 129 U. S. 87, 9 S. Ct. 237;
Diamond vs. Connally, 276 Fed. 87;
Payne vs. Hook, 74 U. S. (7 Wall) 425, 430;
Gaines vs. Fuentes, 92 U. S. 10;
Markham vs. Allen, 326 U. S. 490, 493;
Clark vs. Allen, 331 U. S. 503;
National Mutual Ins. Co. vs. Tidewater Transfer Co., 337 U. S. 582, 93 L. Ed. 1558, 69 S. Ct. 1173.

Argument

The Court of Appeals was in error in dismissing this cause for lack of jurisdiction. Constitution Article III, Section 2, provides, "The judicial power shall extend to all cases, in law and equity, arising under the Constitution, the Laws of the United States * * *, and, between citizens of different states." "In all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

United States Code Title 28, Section 1331, Provides, "The District Court shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000.00, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United

States." Section 1332, Provides, "The District Court shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000.00, exclusive of interest and costs, and is between citizens of different states."

Section 1343, Provides, "The District Court shall have original jurisdiction of any civil action authorized to be commenced by any person, to recover damages for injury to his property, or because of the deprivation of any right, privilege of a citizen of the United States by any act done in furtherance of any conspiracy mentioned in section 47 title 8, to redress the deprivation under color of statute, state law, or ordinance, regulation, custom, or usage, of any right, privilege, or immunity secured by the Constitution of the United States, or any act of Congress providing for the equal rights of citizens, or all persons within the jurisdiction of the United States."

U. S. C. A. Title 8, Section 47(2) Provides, "* * * if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any state, or territory, with intent to deny to any person, citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce the right of any person, or class of persons to the equal protection of the laws."

U. S. C. A. Title 28, Section 1391, Provides, "A civil action where jurisdiction is founded only on diversity of citizenship, may, except as otherwise provided, by law, be brought only in the judicial district wherein plaintiffs or all defendants reside; a civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the district where all the defendants reside."

(a) The judgment of the Court of Appeals is in conflict with Art. III, Sec. 2, *Supra*, and the Act of Congress. *Supra*.

(b) The judgment of the Court of Appeals is in conflict with Sections 1331, 1332, 1343 and 1391 *Supra*.

(c) The judgment of the Court of Appeals is in conflict with the decisions of this Court in the several cases cited under "Summary" *Supra*.

(d) The judgment of the Court of Appeals is in conflict with the decision of other courts of Appeal on question of jurisdiction in the following cases.

Harrison vs. Moncravie, 264 Fed. 779;
Miama County Bank vs. Bancroft, 121 Fed. 2nd 921;
Diamond vs. Connally, 276 Fed. 87;
Sullivan vs. Title Guarantee & Trust Co., 74 Supp., 964, Syl-1 and 4, 66 S. Ct. 296, 90 L. Ed. 256;
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Taylor vs. Smith, 167 F. 2nd 797;
Hilliard vs. Brown, 170 F. 2nd 3977;
Hudson vs. Newell, 172 F. 2nd 848;
Gills vs. Keystone Mutual Cas. Co., 172 F. 2nd 826.

Question

Has the Federal Court jurisdiction and the United States Supreme Court appellate jurisdiction in this cause? Yes, under the Constitution and Acts of Congress herein cited the district court had jurisdiction of this cause; the Court of Appeals was in error in affirming the judgment of the district court.

Conclusion

We therefore submit that writ of certiorari should issue in this cause.

Respectfully,

I. H. SPEARS,
Attorney for Petitioner,

THOS. CAMPBELL,
Associate Counsel.